

MONTGOMERY COUNTY, STATE OF MARYLAND

Val Chlebowski
12427 Loft Lane
Silver Spring, MD 20904

Complainant
vs.

Rolling Acres Homeowners Association, Inc.
c/o Chambers Management
12051 Tech Road
Silver Spring, MD 20904

Respondent

COMMISSION ON COMMON
OWNERSHIP COMMUNITIES

Case No. 03-631-0

Panel Hearing Date: Sept. 22, 2004
Decision Issued: December 22, 2004

Panel Chair Memorandum By: John F. McCabe, Jr.

MEMORANDUM DECISION AND ORDER

The above entitled case came before a Hearing Panel of the Commission on Common Ownership Communities for Montgomery County, Maryland, for hearing on September 22, 2004, pursuant to Sections 10B-5(i), 10B-9(a), 10B-10, 10B-11(f), 10B-12, and 10B-13 of the Montgomery County Code, 1994, as amended. The duly appointed Hearing Panel considered the testimony and evidence of record, and finds, determines and orders as follows:

BACKGROUND

This is a complaint filed on March 19, 2003, by a lot owner in a homeowners association against the homeowners association. The Complainant alleges that the Respondent has continuously, over a long period of time, failed to adhere to its responsibilities under Maryland law and under its documents. The actions complained of can be summarized as follows:

1. Failure to give required notices of membership meetings, Board meetings, and annual assessments;

2. Failure to maintain records in an orderly, easily accessible manner, and in some instances, failure to maintain any records at all, such as minutes of meetings;
3. Failure to give the Complainant access to the books and records of the Respondent as required by Maryland law and the Association documents;
4. Failure to hold the number of Board of Director meetings required by the By-laws of the Association;
5. Failure to conduct an annual membership meeting in 2002;
6. Failure to elect the proper number of directors for the Association and the proper number of officers for the Association;
7. Failure to provide the homeowners with copies of certain documents as required by the By-laws;
8. Failure to have checks issued by the Association signed by the proper officers;
9. Failure to remove certain allegedly incorrect information from the Association's records with respect to a lawsuit filed by the Complainant against the Respondent on November 8, 1991, Chlebowski vs. Utter, District Court of Maryland for Montgomery County, Civil Case No. 0024749-91.

The Respondent has admitted that it must comply with Maryland law and the documents of the Association, and that at times it has failed to do so. The Respondent's position is that it has substantially complied with the minimum requirements of Maryland law and the Association documents, and that it has made substantial progress in the last two years in correcting the errors of the past.

FINDINGS OF FACT

1. The Complainant, Val Chlebowski, is a lot owner in the Respondent homeowners association, Rolling Acres Homeowners Association, Inc.
2. Respondent is a homeowners association located in Montgomery County, Maryland consisting of 108 units. The Association's By-laws call for five (5) Board members. However, there are currently only two Board members serving.
3. Since at least 1991 and continuing to the present, there has been a pattern of failures of the Association to adhere to the requirements of Maryland law and the Association documents with respect to the operation of the Association.
4. The most egregious violations occurred in 2002 when the Association virtually ceased to function.
5. The evidence of record establishes that the Association more often than not failed to follow the budget procedures of Section 10B-18 of the Montgomery County Code, and failed to give the notice required under Article V, Section 7 of its Declaration of Covenants thirty (30) days in advance of each annual assessment.
6. The Association failed to give reasonable notice of all regularly scheduled and required open meetings of the Association in accordance with Section 11B-111 Real Property Annotated Code of Maryland.
7. The Association failed to conduct the annual membership meeting in 2002 and two required Board meetings each year.
8. The Association failed to keep minutes of the proceedings of its members and Board of Directors as required by Section 2-111, Corporations and Associations, Annotated Code

of Maryland.

9. The Association failed to make its books and records reasonably available for examination and copying by the Complainant as required by Section 11B-112, Real Property, Annotated Code of Maryland, and Article XIII, Section 5 of the By-laws of the Association.

10. The Association failed to establish a nominating committee to nominate candidates for election to the Board of Directors as required by Article V of its By-laws, Section 1 and failed to conduct the elections of Directors in several instances by secret written ballot as required by Article V, Section 2 of its By-laws.

11. Article VIII, Section 8(a) and 8(d) combined of the By-laws require that the president and treasurer shall sign all checks of the Association. The evidence of record showed that rarely if ever did the Association do this.

12. Article VI, Section 1 of the By-laws of the Association requires that the Board of Directors hold at least two meetings in each fiscal year. In 2002 and again 2003 the Association did not hold two meetings of the Board of Directors.

13. Article III, Section 1 of the By-laws of the Association requires that there be an annual meeting of the members. In 2002, and perhaps in other years as well, the Association did not hold an annual meeting of the members.

14. Article VIII, Section 8 of the By-laws provides that the president shall preside at all meetings of the Board of Directors. On several instances employees of the management company presided at meetings.

15. Article VIII, Section 8(d) of the By-laws requires the Treasurer of the Association to cause an annual audit of the Association books to be made by a public accountant at the completion

of each fiscal year, and a statement of income and expenditures to be presented to the membership at its regular annual meeting, and to deliver a copy of each to the members. The evidence and testimony indicated that copies of these documents have never been delivered to the members.

16. The Complainant made at least two attempted inspections of Association records, one in June and another in July of 2002 at the offices of the Association's management company. The Complainant also requested copies of Association records. On the basis of the evidence and testimony, the Panel finds that the documents available at the personal inspections and documents produced either before or after the inspections revealed that certain documents were either missing or not provided to the Complainant. Certain records are maintained at the Association's management company and others are maintained in storage at a different location. Knowing this, the Complainant has an obligation to identify the records he wishes to inspect, so that the Association's management company may have a reasonable time to locate and retrieve those in storage. However, it appears to the Panel that the records maintained at least on site at the management company's offices are not maintained in such a way that a member could reasonably expect to find all of the current records filed in an organized orderly way so that they are readily retrievable.

17. There appears to be no individual designated as secretary who is consistently responsible for keeping minutes of meetings of the Association and its Board when they are held. At the time of the hearing on September 22, 2004, there were only two Board members. The Vice President, John Naman, appeared and testified.

18. Based upon his history with the Association's management company the Complainant felt that he needed to retain the services of a police escort when he inspected Association files in 2002. He did so at a cost of \$60.00 to him. The Association, based upon its past

interactions with Complainant, believed that it too had to retain the services of a security guard. It did so at a cost of \$60.00 and charged the Complainant \$30.00, one-half of that cost, at the time the Complainant paid for his copies of the records he obtained.

19. In the 1990 - 1991 time frame, Complainant and Respondent had a dispute regarding the payment of Complainant's assessments. Complainant paid the claimed assessments under protest and then sued the Respondent in the District Court of Maryland for Montgomery County, in the case referred to in the Background section of this Decision and Order. Complainant was the Plaintiff in that case, Respondent was the Defendant. The case was settled by a payment to Complainant of \$198.00. Thereafter, certain correspondence in the records of the Association stated that the Association had been the Plaintiff, had sued the Complainant herein, as the Defendant, and that the Association was successful. Complainant has requested that these mistaken statements be removed from the files. There also are documents in the records of the Association which disparage Complainant. Complainant feels that these documents are false and perhaps defamatory and he has requested that these be removed as well from the Association records.

20. Complainant served upon Respondent Interrogatories and a Request for Production of Documents which Respondent did not timely answer. As a result, the Commission ordered the Respondent to reply to those discovery requests on or before April 22, 2004. The record reflects that the response to the request for documents was made on March 31, 2004, and that the response to interrogatories was made and served on April 21, 2004 by mail. The Respondent also produced an affidavit indicating that the responses to Interrogatories was posted to the Complainant's front door on April 21, 2004. Complainant raised no further issues regarding this discovery until the night of the hearing. The Panel finds that at this time the issue of responses to Complainant's discovery is

moot.

21. Complainant has requested attorney's fees in the amount of \$1,050.00 and reimbursement of \$60.00 representing the amount he paid to have a security guard accompany him in 2002 when he inspected the Association's documents.

22. The Association has requested reimbursement of attorney's fees in the amount of \$4,000.00 plus \$100.00 in costs for copies furnished to the Complainant.

23. The Association argued at the hearing on September 22, 2004, that it had met all of the minimum requirements of its legal documents and of Maryland law. The management company hired by the Association, however, did not appear to be sufficiently versed in the requirements of the Association's governing documents. This may be due in part to the failure of the Board of Directors to supervise the management company and to require adherence to acceptable standards in the industry. The witness from the management company certainly appeared to understand the duties involved in managing the Association, but it appears that it acquiesced too much to the inexperience and ineptitude of one or more Board members and the rest of the Board did not correct this situation.

CONCLUSIONS OF LAW

1. Respondent Rolling Acres Homeowners Association, Inc. is required to adhere to the requirements of Maryland law and of its documents.

a. It must conduct open meetings, including specifically, annual membership meetings, Board of Directors meetings and committee meetings, and give notice of those meetings in accordance with the Maryland Homeowners Association Act, Title 11B, Real Property, 11B-111.

b. It must make the books and records of the homeowners association available to its members in accordance with its By-laws and Section 11B-112, Real Property.

c. It must keep correct and complete books and records of its accounts and transactions, and keep minutes of the proceedings of its members and of the Board of Directors and of any committee in writing or in a form which may be converted within a reasonable time to writing, and must keep its minutes in written form in accordance with Section 2-111, Corporations and Associations.

d. It must give all of the notices required by its By-laws and Declaration with respect to fixing assessments, conducting meetings of the Association, electing directors and officers, providing members with copies of financial information, and making books and records accessible to members.

2. The Complainant has established by a preponderance of the evidence that the Association has failed to meet the above requirements.

3. The Panel does not find pursuant to Section 10B-13(d), Montgomery County Code that this is a frivolous dispute or a dispute maintained other than in good faith, that any party unreasonably refused to accept mediation or unreasonably withdrew from ongoing mediation, or that any party substantially delayed or hindered the dispute resolution process without good cause. Additionally, the documents of the Association do not require an award of costs or attorney's fees. The Panel concludes that the \$60.00 incurred by the Complainant for a security guard was by his own choice. The evidence does not establish that it was necessary for him to incur that \$60.00. As to the costs for the Association's hiring a security guard, the evidence showed that the Complainant voluntarily paid this cost and further that the Association, based upon Complainant's previous conduct, was justified in retaining a security guard.

4. The ultimate responsibility for governing the Association lies with the Board of Directors. The Board may delegate certain responsibilities, but it may not abandon them. In the present case, the management company was apparently not well enough versed in the requirements of the governing documents of the Association, and the Board of Directors did nothing to remedy this failure. Among other things, the Board of Directors, either directly, or through its management company failed in its duty to manage the finances of the Association, in particular with regard to such items as signing of checks and providing financial information to its members, and to conduct the regular business of the Association. While the Board of Directors may look to the management company or accountants or attorneys that it hires for competent advice, the members look directly to the Board of Directors, where the responsibility to manage the Association ultimately lies.

5. The Panel concludes that the Association Respondent allowed itself to become dysfunctional over a period of years, and that it has taken only the most minimal, limited action to correct the situation. The Panel further concludes that it is likely that no action would have been taken had Complainant not brought this Complaint. There is therefore justification for requiring the Respondent Association to pay to Complainant all of the filing fee incurred by Complainant pursuant to Section 10B-13(d), Montgomery County Code.

6. The Association Respondent failed by a large margin to meet the "minium" requirements of its documents and applicable law.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law it is this 20th day of December, 2004

ORDERED:

1. Respondent Rolling Acres Homeowners Association, Inc. must comply with all requirements of Maryland law applicable to homeowners associations and corporations, and with all requirements of its governing documents including, but not limited to, those set forth in this order.

2. To assure that there is compliance, Respondent must submit a written report to the Commission on Common Ownership Communities on or before June 30, 2005, a second report on or before December 31, 2005, a third report on or before June 30, 2006, and a fourth report on or before December 31, 2006, certifying in detail its compliance with Maryland law and its governing documents. Copies of this report shall be served upon each of the members of the Association at the time each report is filed.

3. The written report shall certify, with appropriate documentation, at least the following:

a. That the Respondent has maintained books and records, including records of accounts and minutes in accordance with Section 2-11, Corporations and Associations, Annotated Code of Maryland. This will include minutes of all of its meetings of members, directors and committees, in writing and properly approved. The Association shall provide evidence that it has designated an individual or individuals to keep the minutes and that its president or vice president has presided at the meetings of the Board of Directors and at the annual membership

meetings.

b. That the Respondent has complied with the requirements of its By-laws with respect to maintaining books and records and making them available to its members, including but not limited to Article VIII, Section 8 of its By-laws with respect to the duties of each officer and the delivery of copies of financial information to the members.

c. That the Respondent has given timely notice of its annual budget and annual assessments in accordance with its documents and with Section 10B-18, Montgomery County Code.

d. That the Respondent has conducted its elections in accordance with its By-laws, including but not limited to compliance with Article V regarding the nominating committee and the use of secret written ballots.

e. That the Respondent has executed its documents in accordance with Article VIII, Section 8 of its By-laws, specifically with respect to the signing of checks by the president and the treasurer and with respect to the election of the required number of officers.

f. That the Association has given reasonable notice of and has conducted its annual membership meeting and at least two meetings per year of the Board of Directors.

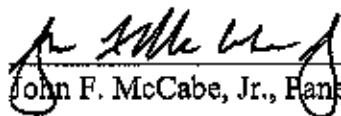
4. The Panel specifically declines to award attorney's fees to either side and declines to take any action with respect to the 1991 case in the District Court of Maryland. Any records and files of the Respondent deemed to be defamatory may be the subject of a separate action by the Complainant if he chooses.

5. The Respondent shall deliver by mail a copy of this order to every unit owner within 30 days after the entry of this order.

6. The Respondent is strongly urged to investigate and avail itself of the assistance available from the Commission on Common Ownership Communities or one of the organizations that assists community associations, such as Community Associations Institute, with respect to the proper procedures for governing an association, as well as from its attorney and accountant, both of whom should become familiar with the governing documents of the Association. As has been said throughout this Decision and Order, the ultimate responsibility to manage the Association is reposed in the Board of Directors, and the Board members have a fiduciary responsibility to their members to see that the management company, the accountant, and the attorney whom they hire perform to the proper standards. This ultimate duty cannot be delegated to others or abandoned, as was done in this case.

The foregoing was concurred by the panel members Vicki Vergagni and Richard Leeds.

Any party aggrieved by the action of the Commission may file an administrative appeal to the Circuit Court of Montgomery County, Maryland within thirty (30) days of this Order, pursuant to the Maryland Rules of Procedures governing administrative appeals.


John F. McCabe, Jr., Panel Chair